IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-138

DELTA COMMUNICATIONS CORPORATION,
Petitioner

v.

NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
AND SOUTHERN TELEVISION CORPORATION,
Respondents

REPLY BRIEF

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REPLY BRIEF

The Brief in Opposition filed by NBC is the only brief of the three respondents requiring more than a cursory reply. NBC at least purports to address some of the issues, but by doing so, it demonstrates the strength of petitioner's position and the necessity for this Court's review.

NBC's primary contention, constantly repeated in different ways, is perhaps best summed up in the following three sentences on page 10 of its brief:

> However, Petitioner merely points to evidence allegedly showing that these [affiliate] stations indicated to NBC that they would prefer that NBC not affiliate with Petitioner's station. From this, Petitioner contends that an "inference" exists that NBC's alleged "refusal to deal" with Petitioner was the result of a conspiracy. As the District Court properly held, Petitioner's argument fails because undisputed facts showed that (1) the alleged refusal was not a refusal at all; and (2) the supposed inference on which Petitioner relies is wholly unreasonable.

Of course, petitioner did not *merely* point to evidence of pressure by affiliates of NBC. But more importantly, the record shows that during the most crucial period of petitioner's operation, the time when first impressions were being made, NBC refused all programming to petitioner, and during a later lengthy period it refused to grant sufficient programming to allow petitioner to become successfully operational. And both of these refusals occurred while the network's affiliates were seeking just such action by NBC.

This can be demonstrated by findings of the District Court itself. For example:

> "In December of 1967 Delta [petitioner] contacted NBC seeking to broadcast its programs." App. A-7.
>
> "On December 6, 1967 ABC granted Delta the right to televise all ABC programs which were not being shown by Southern." *Id.*
>
> "In May of 1968 CBS agreed to allow Delta to use certain programs which were not 'cleared,' *i.e.*, requested for showing by Southern. * * *" App. A-8.
>
> "In June of 1968 [six months after Delta's December 1967 request to broadcast NBC programs] Delta's WHTV station finally went on the air. *The only network programs it was able to present were the ABC and CBS programs which Southern did not wish to show.*" *Id.*; emphasis added.
>
> "In September of 1968 [three months after Delta went on the air and nine months after its December 1967 request for NBC programs], NBC gave Delta the right to broadcast seven programs." *Id.*

The record shows that all during the December 1967-September 1968 period (and thereafter), petitioner continued to implore NBC to allow it programs—at no cost to NBC or compensation to petitioner—and that all during such period (and thereafter) NBC's affiliates in Jackson and Harrisburg were imploring NBC not to allow programs to petitioner.

The District Court continued:

> "As previously stated, there exists a fact question as to whether WDAM *actually influenced* NBC not to allow NBC programs on Delta, and it is assumed that such pressure was exerted." App. A-72; emphasis added; footnote deleted.
>
> "The facts show that any alleged improper pressure on NBC not only came from WDAM, but also from WLBT in Jackson." App. A-73.

Thus, even on the face of the District Court's opinion, petitioner has demonstrated that, for six months prior to petitioner's commencement of broadcasting and for three months thereafter—the period of petitioner's most critical need for programming—NBC refused to honor petitioner's urgent requests for programs, during which time the affiliates were pressuring NBC to deny such programs.

Even without more (and there is much more in the record), these facts fully support, and indeed require, an inference that the denial of programs was due to the affiliates' pressures. *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979); *Girardi* v. *Gates Rubber Co. Sales Div., Inc.*, 325 F.2d 196, 202 (9th Cir. 1963), cited with apparent approval in *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *see also* the recent note entitled, "Refusals to Deal as Violations of the Federal Antitrust Laws," 41 ALR Fed. p. 175 (1970). And from an antitrust standpoint, it makes little difference whether NBC refused to deal at all or whether it merely dealt in such a way as to impair petitioner's ability to become a threat to the network's complaining affiliates.

As noted in the three sentences from NBC's brief quoted above, that company claims that the evidence upon which petitioner relies and the inferences to be drawn therefrom are "wholly unreasonable." One wonders why. This unfortunately would not be the first time that a

network has bowed to the exhortations of its already-operating affiliates in a matter of importance to them. But even more to the point, these assumptions as to reasonableness or unreasonableness are precisely the kind that a District Court should not be allowed to indulge in on a disputed record, when passing on a motion for summary judgment. The District Court was bound not only to view the evidence in the light most favorable to petitioner but to give petitioner the benefit of all inferences which the evidence fairly supports, *even though contrary inferences might reasonably be drawn. Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

The existence here of facts tending to support the view that NBC's denial of programs was not a purely unilateral act but rather one motivated by its affiliates' pressures clearly distinguishes this case from *Cities Service.* As pointed out in *Seligson* v. *New York Product Exchange*, 378 F. Supp. 1076, 1093 (S.D.N.Y. 1974), in *Cities Service* the "plaintiff's amended complaint left him with the bare allegation that Cities Service Company's mere cessation of a course of conduct was *by itself* sufficiently probative of a conspiracy to resist summary judgment" (emphasis in the original). Since, as *Seligson* noted, this Court in *Cities Service* "took pains to distinguish" that case from *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), "the facts in *Cities Service* suggest that it may be *sui generis.*" 378 F. Supp. at 1093.

NBC treats *Cities Service* differently, as did the courts below. It contends (p. 11) that petitioner's inference was "overwhelmed" by what it calls "the *undisputed facts* in the record" (emphasis in original), and then proceeds (p. 12) to quote the District Court to the effect that the bargain offered by petitioner was demonstrably "*unattractive*" (emphasis in original). No inference of anti-competitive conspiracy, NBC says, "would be reasonable" (again quoting the District Court's opinion).

NBC thus succeeds in pinpointing the serious point of dispute involved in this case, and if it is correct that other courts are following the same interpretation of *Cities Service*, it has shown why a grant of certiorari is essential.

We submit that *Cities Service* should be restricted to situations where there is *no* showing that a refusal to deal was other than a unilateral act—where the refusal to deal alone is relied upon as the basis for the alleged illegality. NBC, on the other hand, contends that even in a case where facts in addition to a refusal to deal are relied upon, *Cities Service* allows the District Court, by way of summary judgment, to perform the function of the court or jury at trial on a full record, to weigh all inferences, and to decide the merits on the basis of probabilities.

This Court has twice admonished lower courts that summary judgment should be used sparingly for defendants in antitrust conspiracy cases. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *Poller* v. *Columbia Broadcasting System, Inc.*, *supra*, 368 U.S. at 473; *see also Cities Service*, *supra*, 391 U.S. at 303 (Black, J., dissenting). A noted expert on the federal courts has also stated flatly in regard to summary judgment: "The moving party is not entitled to the benefit of favorable inferences to be drawn from his moving papers." Wright, Law of Federal Courts (3rd Ed. 1976) at p. 495 (footnote deleted).[1]

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[1] Illustrative of the application of this rule was this Court's reversal of summary judgment in another antitrust case in which it said, in respect to two "findings" by the District Court:

> * * * [B]oth findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment *the inferences* to be drawn from the under-

Despite these statements, lower courts, like the ones below, continue to grant summary judgment on the basis of what they deem to be "favorable inferences," even in complex conspiracy cases like the instant one with an extended pretrial record.

Both ABC and Southern in their Briefs in opposition make assertions similar to those of NBC to the effect that *Cities Service* was not misconstrued or misapplied. Additionally, Southern urges that petitioner's case of monopolization was supported by nothing but mere allegations. This argument of Southern disregards the facts in the record showing its monopoly position and its furtherance of that monopoly by renewal of its first call contract with ABC (giving it 100 percent control of all nationally televised programs available in the area) and its preemption of ABC and CBS programs reducing nationally televised prime time programs available to petitioner by over 30 percent.

Both Southern and ABC urge that showings of "rational business justification" and self-interest negate any inference of monopolization. These arguments are consistent with the decisions below and illustrate the lower courts' improper delineation of the law of monopolization.

Except as shown above, neither ABC nor Southern addresses the issues here. In fact, none of the three respondents even alludes to the two most important Court of Appeals opinions relied upon by petitioner—one setting

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lying facts contained in such materials *must be viewed in the light most favorable to the party opposing the motion.* A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court *might be permissible.* The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n,* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c). [*United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962) (emphasis added).]

forth the traditional rule of how inferences are to be treated,[2] and the other showing how the Fifth Circuit had misapplied that rule subsequent to the District Court opinion below by reliance on *dicta* in this Court's *Cities Service* decision.[3] Perhaps most importantly, not one of the respondents even attempts to come to grips with petitioner's argument that it was the very denial of adequate network programming, carried out pursuant to a combination and/or monopolization, which resulted in the illegal damages to petitioner.

With great respect, we suggest that the confusion in the case law is in large part due to the misunderstood *dicta* of this Court in the *Cities Service* case, and we respectfully suggest that for this and the other reasons stated in our petition, review is fully warranted in this case.

Respectfully submitted,

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[2] *American Fid. & Cas. Co.* v. *London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965), cited at page 14 of the Petition.

[3] *Aviation Specialties, Inc.* v. *United Technologies Corp.,* 568 F.2d 1186 (5th Cir. 1978), cited at page 14 of the Petition.